

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 204 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

JAGDISH NATHALAL BARAI

Versus

UNION OF INDIA

Appearance:

M/S THAKKAR ASSOC. for Petitioner
MR JAYANT PATEL for Respondent No. 1

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 20/02/97

ORAL JUDGEMENT

Rule.

I have heard both the sides on merits at length.
I therefore, proceed to dispose of this petition finally.

2. Jagdish Nathalal Barai of Rupen Bunder has filed the present petition to challenge the action of the respondent no.2 in passing the order dated 2.1.96 to

disconnect his telephone no. 4312.

3. Present petitioner is having 2 telephone connection, one a Local PCO bearing No. 4312 and another having STD facility bearing No.4553 and he is using the telephones respectively from 2.5.95 and 8.10.91. It is further the case that on 25.8.95 the petitioner received a notice from the department of respondent no.2 that the petitioner is using conference facilities unauthorisedly for his telephone no.. 4554 and therefore, a show cause notice was being served on him under Rule 420 of Indian Telegraph Rules (herein after referred to as the said Rules) as to why the STD PCO telephone bearing no. 4554 be not disconnected. The petitioner accordingly replied the said notice by stating that the claim that he was making use of the conference facilities on the said PCO was not correct and he also required the department to clarify as to how said alleged claim was made against him. But thereafter no action was taken but the allegations were repeated by a notice issued on 27.11.95. Same was again replied by reply dated 7.12.95. Though the petitioner was asking the department repeatedly to give him hearing, no hearing was given to him . But all of a sudden on 2.1.96, the respondent no.2 passed an order to disconnect the telephone no. 4312 without issuing the show cause notice as provided by the said Rule 420 and therefore, he has come before this court to quash and set aside the order passed by the respondent no.2 to disconnect the telephone no. 4312 without issuing a notice under Rule. 420 of the said Rules.

4. The claim of the petitioner is resisted by the respondent no.2 by filing affidavit in reply. It is contended that the action to disconnect the telephone no.4312 was not taken on the strength of the earlier notices served on the petitioner but it is contended that respondent no.2 received a report dated 29.10.95 from his subordinates saying that telephone no. 4312 was attached with conference facility/conference attachment. Said attachment was unauthorised one and therefore, in exercise of the powers under Rule 426 of the said Rules, the order in question is passed. Said order is legal and valid and that the action in question is not tenable in law. At the most in view of the claim of the petitioner, it could be said that there is a dispute. But in view of the provisions of section 7B of the Indian Telegraphs ACT 1885(hereinafter referred to as the said Act), said dispute will have to be referred to Arbitration. Thus it is contended that the petition be dismissed with costs.

5. It is an admitted fact that before passing the order in question on 2.1.96, no notice under Rule 420 of the said Rules was issued. It is the claim of the respondent that as it was found that the petitioner was using the conference facilities unauthorisedly to his telephone no. 4312, the action in question is taken u/s 426 and it was not necessary to issue a show cause notice as contemplated by Rule 420 of the said Rules. In order to appreciate this contention, it is necessary to peruse the Rules viz. Rules 420, 421, 422, 426 and 427. These Rules are running as under:

"420. Default of subscribers due to insolvency etc.- When a subscriber is adjudged an insolvent or makes or enters into any composition or arrangement with his creditors or suffers execution to be levied upon his premises, or commits any breach of or fails to observe and comply with any of these rules, the Telegraph Authority may close the connection by giving to the subscriber notice in writing for a period of seven days.

421. Disconnection of telephones Where the Divisional Engineer is satisfied for reasons to be recorded in writing that it is necessary to do so, he may, after giving the subscriber a notice in writing for a period which shall not except in emergent cases be less than seven days, connect the telephone, and in such case, the subscriber shall be entitled to refund of rent for the unexpired portion of the period for which the connection or service was given.

422. Right of disconnection in emergency. The Divisional Engineer may, in the event of any emergency, disconnect any subscriber with or without notice. In case such disconnection exceeds a period of 7 days, the subscriber shall be entitled to proportionate refund of rent.

426. Charges for damage to apparatus. In the event of the apparatus on the subscriber's premises or any part thereof being damaged, lost or altered from any cause whatsoever, the subscriber shall pay on demand the cost of repairing renewing or replacing it, which cost shall be determined by the Divisional Engineer. The Divisional Engineer may also disconnect the connection of a subscriber who alters or makes

any attachment to the apparatus supplied.

427. Illegal or improper use of telephone. A subscriber shall be personally responsible for the use of his telephone. No telephone shall be used to disturb or irritate any person or for the transmission of any message or communication which is of an indecent or obscene nature or its calculated to annoy any person or to disrupt the maintenance of public order or in any other manner contrary to any provision of law."

It is true that under Rule 426 any attachment to the departmental apparatus is attached/made, then the Divisional Engineer may disconnect the connection of the subscriber. But merely Rule 426 gives discretionary power to order the disconnection on making of any attachment to the apparatus supplied by the department, it could not be said that the procedure laid down in Rule 420 is not to be followed. From the conduct of the respondent himself as revealed in the petition, it would be quite clear that in respect of the present petitioner himself a notice was issued on 25.8.95 under Rule 420 of the Rules calling upon the petitioner to show cause as to why the STD PCO telephone no.4554 be not disconnected for using conference facilities. If at all the telephone could be disconnected without following the procedure laid down in Rule 420 on account of making an attachment to the apparatus, then the respondent would not have issued the said notice. It is also very pertinent to note that Rule 426 also does not specifically mentions empowering the Divisional Engineer to disconnect the telephone by saying that he may disconnect the telephone connection of subscriber who alters or makes any attachment to the apparatus supplied without issuing notice under Rule 420. When there is no such specific provision in Rule 426, then the procedure laid down in Rules 420 and 421 must be followed. The making of an attachment to the apparatus supplied by the department unauthorisedly is a misuse of the said telephone apparatus. But merely because it is a misuse , said misuse could result into passing of order of disconnection without following the procedure laid down in Rules 420 and 421. It is also very pertinent to note that Rule 426 only gives a discretionary power. It does not say that on finding of making any attachment or alteration to an apparatus supplied, the Divisional Engineer shall disconnect the telephone connection. It provides that he may disconnect it. Merely because in the said Rule it has been mentioned that Divisional

Engineer may also disconnect the telephone of a subscriber who alters or makes any attachment to the apparatus supplied it could not be said that such making of an attachment or alteration to a telephone apparatus, empowers the Divisional Engineer not to follow the procedure laid down under Rules 420 and 421 . The power given to the department to disconnect any telephone connection without following procedure of Rules 420 and 421 is under Rule 422 in the event of any emergency. In all other cases of disconnection whether on account of causing damage or alteration to an equipment or illegal or improper using of the telephone as provided in Rules 425 to 433, the procedure prescribed under Rules 420 and 421 must be followed. The Supreme Court has considered the provisions of Rule 420 as well as Rule 422 in the case of Hukum Chand Shyam Lal vs. Union of India & ors. AIR 1976 SC 789 and has made the following observations in paras 17 and 18:

" Assuming that the General Manager was competent to make an order under Rule 422, the power has been exercised mainly on a ground which is not a relevant consideration under this Rule. This ground as recited in the Delhi Administration Notification of December 4, 1972 and reproduced in the impugned order of the General Manager, Telephone, is that illegal forward trading(satta) in agricultural commodities is being practised in a large scale through the telephones in question at the premises of Coronation Hotel, Fatehpuri. In other words, the impugned action has been taken chiefly on the ground that the appellants have been making improper or illegal use of these telephones. This being the position, the appropriate course to be followed was that laid down in Rule 427 read with Rules 416 and 421. But this was not done.

18. It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature and its exercise in a mode other than the one provided, will be violative of the fundamental principles of natural justice. Now, in the present case, if the telephones of the appellants were to be disconnected on the ground of misuse, then they

had to give, in consonance with the principles of natural justice, opportunity to the appellants to explain their conduct before taking action under Rule 427 read with Rules 416 and 421. Report to wrong and more drastic course provided in Rule 422 on a ground which was not germane to an action under that Rule, vitiates the impugned order, particularly when it is manifest that in making the impugned order the General Manager was influenced more by this ground and less, if at all, by the existence of 'public emergency' certified by the Delhi Administration."

Therefore, even in case of misuse of the apparatus BY A subscriber, even if it amounts to misuse as contemplated by Rule 426, the provisions of Rule 420 and 421 will have to be followed. When Rule 422 makes a specific provision as to in what circumstances, the telephone connection of a subscriber is to be disconnected and when section 426 does not specifically mentions that the Divisional Engineer can disconnect the connection on account of alteration or making any attachment to the apparatus without giving notice. It is not possible to read the said provisions viz. that he can disconnect the connection without giving notice in the said Rule 420. Therefore, in the circumstances I hold that the present petition will have to be allowed and the order passed by the respondent no.2 on 2.1.96 will have to be quashed and set aside. Accordingly the order dated 2.1.96 is hereby quashed and set aside. Accordingly the petition is allowed. Rule made absolute. No order as to costs.

(S.D.Pandit.J)